NO. 80-5658

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RENE MIRELES RUIZ,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The County Court At Law No. 1
Hidalgo County, Texas

APPELLEE'S MOTION TO DISMISS OR AFFIRM

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III.
Executive Assistant
Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR APPELLEE

QUESTION PRESENTED

I. Whether the First Amendment allows a conviction for "abusive language" when the vilifying language viewed in conjunction with the aggressive and threatening conduct that accompanied the language, reasonably caused the police officers to whom such language and conduct were directed to conclude that the language "by its very utterance tended to incite an immediate breach of the peace."

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, and, by and through its Attorney General, Mark White, files this its Motion to Dismiss or Affirm.

OPINION BELOW

Appellant correctly states that there is no written opinion of County Court at Law No. 1, Hidalgo County, Texas, in the case. That court overruled all of Appellant's various First Amendment objections at trial.

JURISDICTIONAL STATEMENT

Although Appellant does not challenge the constitutionality of the Texas statute under which he was convicted, he

does assert that the statute was unconstitutionally applied to him. For that reason, the Court may have jurisdiction of this appeal under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Appellant relies upon Tex. Const. amend. I, Tex. Penal Code §42.01(a)(1), and Tex. Code Crim. Proc. Ann. art. 4.03.

STATEMENT OF THE CASE

During the evening of April 2, 1980, Officer Carlos Benavides and Officer Richard Madden of the Texas Department of Public Safety observed a pickup truck travelling at a high rate of speed on South 10th Street in McAllen, Texas. (S/F 20). The officers followed the pickup. They observed the pickup run a red light and put on their overhead lights to attempt to pull the vehicle over. (S/F 21). The driver, however, did not stop, and attempted to avoid a second intersection by cutting across a shopping center parking lot. (Id.). The driver then pulled into the parking lot of a Church's Fried Chicken. The police, at this point, were immediately behind the pickup and the driver stopped. (Id.).

Mr. Sarabia, the driver of the pickup, stepped out to talk with Officer Benavides. Appellant, who was a passenger in the pickup, got out and "just kind of stood between" Officer Benavides and Mr. Sarabia. (S/F 22). Officer Benavides smelled alcohol on the breath of both suspects. (S/F 24, 68). Even though Officer Benavides requested that Appellaht step to one side so he could talk to Mr. Sarabia, Appellant refused. (S/F 22). Officer Benavides requested that Mr. Sarabia follow him to the McAllen Police Station. Appellant again interjected himself into the matter and told the officer, incorrectly, that he had no right to take them in. (S/F 24).

Since Mr. Sarabia knew the way to the police station, Officer Benavides decided to follow the pickup. On the way to the station, Appellant "just stood out of his car, about half of his body, and said something" to some passing cars full of girls. (S/F 25). This behavior is indicative of Appellant's attitude toward the policemen following just behind the pickup.

On arriving at the parking lot of the police station, and while still outside, Officer Benavides again attempted to explain to Mr. Sarabia why he had taken him to the station. Appellant again interjected himself ino the conversation and told Officer Benavides that he had no right to bring them in and that Officer Benavides could have just given them a traffic citation and let them go. (S/F 29). Apparently Appellant had become more agitated at this point in the evening. (Id.).

The police officers, Mr. Sarabia, and Appellant all entered the police station. At the front desk, Officer Benavides explained to the desk officer why he had brought Mr. Sarabia into the station. Again, for the third time, Appellant interjected himself into the matter. His attitude at this point toward the officers had further deteriorated. (S/F 29). Officer Benavides then turned to explain to Mr. Sarabia what he needed to do to clear up the traffic citations. For the fourth time that night, Appellant attempted to involve himself in the discussion, and at this point Mr. Sarabia asked him to shut-up and go sit in the pickup. (S/F 31, 163). Finally Appellant went out to the pickup.

After Mr. Sarabia posted bond, Officers Benavides and Madden exited from the station. As they walked to their police car, they heard loud music coming from Mr. Sarabia's pickup. Just as they were getting into their car, which was

parked near the pickup, they heard Appellant, over the music, say "mother fucker." He then repeated "mother fucker" in a louder voice. Next he repeated "mother fucker" again in a louder voice, and in the words of Officer Benavides, he "threw us the finger." (S/F 33). For this conduct, Appellant was eventually convicted for one type of disorderly conduct: language "that by its very utterance tends to incite an immediate breach of the peace." This appeal followed.

MOTION TO AFFIRM

The application of the Texas abusive language statute in the context and circumstances of this case did not abridge Appellant's First Amendment rights. In the context of the high level of frustration caused by Appellant's conduct and actions, and the adversarial role Appellant had assumed since his initial contact with the policemen and that he had pursued throughout the evening, his vile words in the police station parking lot constituted "fighting words" and were not subject to First Amendment protection.

Appellant's words not only "tended" to incite a breach of the peace, but there is some indication, contrary to Appellant's statements in his brief, that his words actually caused a breach of the peace. Appellant correctly points out that Officer Benavides testified that the words did not offend him and that he would not have hit Appellant. At least one witness, however, testified that the use of some force was necessary to arrest Appellant, subdue him, and take him to the front desk at the police station. (S/F 138, 139). Appellant apparently received some medical treatment the next day. (S/F 177). Further, Officer Madden testified that he was offended by Appellant's words. (S/F 89). The fact that Appellant had taken on an adversarial role which continued over a substantial period distinguishes this case from those he cites.

Several other factors should also be noted. The use of the word "motherfucker" might be more likely to incite the police or citizens to breach the peace in Hidalgo County, Texas, than, for example, in a New York City ghetto. In Hidalgo County, a highly Mexican-American and Catholic area, "motherfucker" is one of the viler, if not the most defamatory, epithet. Second, Appellant made these statements in a public place in which the potential audience was limited only by the loudness with which he could scream the words. Not only could people in the parking lot hear Appellant, but people passing by on the street or in the apartment across the street were also potential witnesses to the scene in the parking lot. The police should not be forced to wait until a citizen who sees these events actually initiates violence. The State has a valid interest in arresting a person that makes statements tending to cause a breach of the peace, before a breach actually occurs.

Even if it were true that on this particular night, no one other than the police, had seen Appellant verbally assail two police officers, the question before this Court is whether the State has the right to regulate speech which has the potential to cause harm. The potential that there could have been witnesses incited by what they saw Appellant say and do, given the fact that the incident occurred in a public place, was more than just a mere possibility. Appellant could not be certain that his words and actions would not be seen and heard by anyone within earshot. Considering all the circumstances surrounding Appellant's statement, the context in which he made it, the Texas abusive language statute, Tex. Penal Code §42.01, was not unconstitutionally applied.

On its facts, this case resembles Chaplinsky v. New Hampshire, 315 U.S. 668 (1942). There the Court affirmed the conviction of a defendant for saying to a police officer in public, "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists". The Court said:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are cerain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or "fighting" words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterance are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571-572.

Like the New Hampshire statute, the Texas statute is narrowly drawn with the relevant Supreme Court cases in mind so that it only proscribes language not protected by the First Amendment. In Jimmerson v. State, 561 S.W.2d 5 (Tex.Crim.App. 1978), the Texas Court of Criminal Appeals heard a defendant challenge, on the basis of Gooding v. Wilson, 405 U.S. 518 (1972), the constitutionality of another portion of the statute in question, § 42.01(a)(4). Although the Court of Criminal Appeals ultimately found it unnecessary to determine the question, it asked rhetorically whether § 42.01(a)(4) applies "only to 'fighting words' which by their very utterance tend to incite an immediate breach of the peace." The court then answered its question:

> ... we are confident that the Legislature intended that anything short of 'fighting words' would not be a violation of that section because the section was enacted and became effective (January 1, 1974) well after the decision in Gooding v. Wilson and Chaplinsky v. New Hampshire, both supra, had clarified the law on the subject of disorderly conduct statutes...

561 S.W.2d at 7.

This Court did not declare the Texas statute void on its face in Acker v. Texas, 430 U.S. 962 (1977). The statute has been narrowly drafted by the legislature and narrowly construed by the Texas courts. On the facts of the case at bar, the statute was properly applied. The judgment should be affirmed.

MOTION TO DISMISS

This case fails to present a substantial federal question and should be dismissed for that reason.

First, as explained above, no challenge to the facial validity of the statute, Tex. Penal Code § 41.01(a)(2) is raised. Appellant challenges only the application of the statute to his words and conduct under the circumstances described. This isolated case is not of sufficient importance to be of concern to the Court. Contrary to Appellant's assertion, a similar set of circumstances is not likely to recur in the future. In fact, Officer Madden, one of the arresting officers in this case, testified as follows with respect to Appellant's abusive language:

> "I was offended [by the action of Appellant] and I couldn't believe it. You know in four and a half years that has never happened before. Most people don't act in that manner, whenever we make an arrest or traffic contact, or whatever."

(S/F 89).

Appellant also complains of a defective jury instruction. The parties are agreed that the statute under which Appellant was convicted is facially constitutional. The parties, therefore, are in agreement that a proper jury instruction is one that would require the jury, in order to return a valid verdict of guilt, to find that the accused has committed all the elements of the offense with which he is charged. Self-evidently, if the trial court erred in its jury instructions, that is a matter to be corrected by writ of habeas corpus, and not one that requires this Court's attention.

Finally, Appellant points to a host of authorities from this Court delineating the parameters of words and conduct that may constitutionally support a conviction for disorderly conduct or abusive language. E.g., Lucas v. Arkansas, 416 U.S. 919 (1974); Lewis v. New Orleans, 415 U.S. 130 (1947); Brown v. Oklahoma, 408 U.S. 914 (1972); and Rosenfeld v. New Jersey, 408 U.S. 901 (1972). It is the very existence of these authorities, and the wealth of guidance for the States that they contain, that render this case unworthy of the Court's attention. Appellant has failed to present any substantial federal question, and his appeal should be dismissed for that reason.

CONCLUSION

For these reasons, Appellee respectfully prays that the appeal be dismissed or affirmed.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

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PROOF OF SERVICE

I hereby certify that on the 5th day of January, 1981, three copies of the Appellee's Motion to Dismiss or Affirm were mailed, postage prepaid, to Mr. James C. Harrington, American Civil Liberties Union Foundation-South Texas Project, Box 1493, San Juan, Texas 78589. All parties required to be served have been served. I am a member of the Bar of this Court.

Douglas M. Becker

DOUGLAS M. BECKER
Assistant Attorney General
Austin, Texas

ATTORNEY FOR APPELLEE

SUBSCRIBED AND SWORN TO before me this 5th day of January, 1981.

Mary Jane Lide Kellogg

NOTARY PUBLIC in and for
Travis County, T E X A S